Supreme Court, U. S.
FILED
NOV 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-760

PEDRO DELAROSA FLORES,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

PEDRO DELAROSA FLORES,
Appellant,

versus No. 57,763

THE STATE OF TEXAS,
Appellee.

Appeal from LUBBOCK County

OPINION

This is an appeal from a conviction for the possession of more than four ounces of marihuana. The penalty was assessed at three years' imprisonment, but imposition of the sentence was suspended while appellant was placed on probation.

Appellant initially complains of the trial court's refusal to disclose the name of the confidential informer who provided the tip leading to the discovery of the marihuana in appellant's vehicle. Appellant claims the informant was crucial to his defense that he knew not of the marihuana's presence or its origination. There was no evidence presented to the trial court in the hearing on appellant's motion to disclose the informant's name that even hinted at the informant's involvement in the offense, his presence at the scene of the offense, or his role other than as an informant. The witness

who did testify regarding the informant stated he was not present at the arrest or search and he was not aware of any involvement of the informant in the offense. More than conjecture is required from a defendant who seeks the disclosure of a confidential informant's identity; he must show the informant to have been present at the time the offense occurred or to have been a material witness to the transaction or appellant's knowing commission of the offense. Brewer v. State, 572 S.W.2d 719; Varela v. State, 561 S.W.2d 186. Appellant's first ground of error is overruled.

Appellant challenges the admission of the marihuana seized from his vehicle as constituting the direct fruit of an unlawful search and seizure. Fourth and Fourteenth Amendments, U.S. Constitution; Article I, Section 9, Texas Constitution. Appellant filed a pretrial motion to suppress this evidence and a hearing was conducted after which the motion was overruled. At the hearing, Detective Sergeant Park testified that at approximately 8 p.m. on January 2, 1975, he received a phone call from a prior reliable informant. The informant advised Sergeant Park, according to the officer's testimony, that a "delivery"[1] was to be made shortly in the vicinity of 35th Street and Avenue A in Lubbock. The informant advised that the parties

1 The State presented two police officers as witnesses at the hearing on appellant's motion to suppress. There was never any testimony that the tip related to the "delivery" of any contraband of any sort. However, at trial and before introducing the marihuana into evidence, Sergeant Park elaborated on the contents of the tip to show that it was to have been a delivery of marihuana and that appellant might be carrying a gun.

making the delivery would be two Spanish individuals, one male named Pete Flores, in a late model, blue and white Chevrolet[2] pickup truck from Tahoka. The informant stated only that the tip was information he had without elaborating on how he obtained such information.

Sergeant Park immediately went to the area in question and observed a blue and white pickup making a legal U-turn on 37th Street and was heading for Avenue A. He accelerated to confirm his observation, noting a "Tahoka Bulldogs" sticker on the vehicle. He signaled the vehicle to stop and ascertained the driver's identification as Pedro Flores. Other officers arrived on the scene and in requesting appellant's companion to exit, observed a seven-inch moon-shaped knife on the floorboard. The companion admitted ownership of the knife and was arrested. The officers then searched the vehicle, discovering a .45 caliber automatic pistol in the glove compartment[3] and a plastic bag with 22 baggies of green leafy substance, later determined to be marihuana, behind the fold-down seat.

2 The second officer who testified at the hearing related that Sergeant Park, who took the informant's call, asked for his assistance and told him to look for a white over blue *Ford* pickup. He also testified that the vehicle stopped was a blue and white *Ford*.

3 Sergeant Park testified that when signaling appellant's vehicle to stop, he noticed appellant lean forward as if towards the glove compartment.

Appellant relies on Cole v. State, 484 S.W.2d 779, Rushing v. State, 500 S.W.2d 667, and Kaser v. State, 505 S.W.2d 806, for the proposition that the observations of Sergeant Park did not corroborate the informer's tip concerning appellant's possession and/or delivery of marihuana, thereby negating any probable cause for his arrest and vehicle search. Since no information was imparted to Sergeant Park on *how* the informant acquired his information, we assume it was hearsay and insufficient, in itself, to satisfy the second prong of the *Aguilar*[4] standards for evaluating a "tip" as the basis for probable cause.[5] The so-called "second prong" of *Aguilar*, supra, provides that the magistrate must be provided with the underlying circumstances which tend to show that the information obtained by the informant was obtained in a reliable manner.

Hearsay, when corroborated by independent police surveillance, can provide probable cause for a search or arrest. Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584 (1969). Further, particularity and specificity in an informant's tip, when confirmed by police observations, can cure an initial defect in satisfying *Aguilar's*, supra, second prong. Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329 (1959).

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4 Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964).

5 The standards for evaluating information and its basis for a probable cause determination are the same for warrantless arrests and searches as for obtaining such warrants. Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031 (1971).

The cases relied on by appellant are clearly distinguishable and lend him little support in his contention. In *Cole*, supra, the tip failed both *Aguilar* prongs, reliability of the informant and reliable acquisition of the information, yet the police responded quickly with a show of force. In *Rushing*, supra, an unknown and untested informant provided a bare-bones tip two hours before the arrest and search. The arrest and search in that case suffered from a number of deficiencies and the general statement that "the information gained by observations must in some sense be corroborative of the informer's tip" (Id. at 670) must be read in context. In context, this Court noted numerous matters that the tip did not relate which are present here: designated location, use of a vehicle, proposed drug transaction, and time of the transaction. Similar omissions and distinctions exist with respect to the tip in *Kaser*, supra. The cases relied on by appellant cannot be construed as erasing the combined authority of *Spinelli* and *Draper*, supra, from our jurisprudence. Such a conclusion is negated by this Court's continued reliance on those cases and their principles. Rangel v. State, 444 S.W.2d 924; Almendarez v. State, 460 S.W.2d 921; Jordan v. State, 504 S.W.2d 490.

We therefore conclude that the exigency of the situation confronting Sergeant Park (a pending delivery of marihuana in a mobile pickup truck) and his observations corroborating the particulars of the tip (the "Tahoka Bulldogs" sticker; vehicle make, model, and color; number and race of occupants; gender of the

driver; location of the vehicle; time of observation; and identity of driver), thereby assuring himself that his informant obtained his information in a reliable manner, provided a lawful and constitutional basis for the warrantless action taken. We decline to adopt the necessary implication of appellant's position that before any warrantless action could be taken, Sergeant Park should have first waited to observe the actual delivery. Here, every detail of the tip was corroborated before the search was conducted, save for the presence of the gun and marihuana. Furthermore, the information available to Sergeant Park at the time he stopped the vehicle to ascertain the identity of the occupants was sufficient to justify the lesser intrusion of an investigative stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Accordingly, appellant's second ground of error is overruled.

Appellant contends that the trial court erred in denying his motion to quash the indictment because the grand jury selection process was plagued by racial discrimination against Mexican Americans. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272 (1977). Appellant was indicted during the January term of the 137th Judicial District Court (January 17, 1975). The offense was committed on January 2, 1975. The January term of the 137th District Court for 1975 commenced on January 6, 1975. Article 199 (137), V.A.C.S.

Article 19.27, V.A.C.C.P., calls for challenges to the legality of the grand jury to be made before its impanelment. On April 25, 1975, appellant's attorney of

record requested and was granted permission to withdraw. Appellant has at all times been represented by retained counsel. Present retained counsel requested a continuance successfully on July 8 and November 10, 1975. The record is silent for 1976. In 1977 additional motions were filed by present counsel. Not until June 20, 1977, was a challenge made against the grand jury selection process. We must conclude that the combined failure to timely lodge a challenge under Article 19.27, supra, and to lodge a challenge before the passage of nearly two years operates as a dispositive procedural default or waiver of any error alleged. Muniz v. State, 573 S.W.2d 792. Appellant's third ground of error is overruled.

By way of a supplemental brief filed only in this Court on May 9, 1979, over a year after the record was filed here, appellant asserts a similar challenge against the petit jury based on the same evidence adduced on his challenge to the selection of grand jurors. The ground of error was not timely raised under Article 40.09(9) and is therefore not before us for review.

There being no reversible error, the judgment of conviction is affirmed.

PER CURIAM

(Delivered May 23, 1979)

By Panel No. 3, 2nd Quarter,
1979, composed of
Wendell A. Odom, Judge
W. T. Phillips, Judge
W. C. Davis, Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed three copies of the foregoing Supplemental Appendix to the United States Court of Appeals for the Fifth Circuit;to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C., 20530; and one copy to the Honorable Roger McRoberts, A.sistant United States Attorney, C-201, U.S. Courthouse, 1205 Texas Avenue; Lubbock, Texas 79401, by placing the same in the United States Post Office, first class postage prepaid, said service being made in compliance with United States Supreme Court Rule 33.

MARK SMITH